IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1511

CHARLES MURPHY, et al.,
Petitioners,

vs.

THE BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, et al.,
Respondents.

BRIEF OF RESPONDENTS

The Board of Education of the City of St. Louis, et al. in Opposition to Petition for Writ of Certiorari

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QUESTIONS PRESENTED

Petitioners itemize seven questions submitted to this Court. In substance, however, there are only three principal issues which are raised by the petitioners and these will be restated as follows:

1. Whether petitioners' motion for the recusal of Circuit Judges Lay and Bright of the Eighth Circuit on the ground of prejudice against the Board of Education (respondent here) allegedly evidenced in their opinion as appellate judges adjudicating the 1976 appeal in *Liddell, et al. v. Caldwell, et al.*, 546 F.2d 768, and for having formed an opinion as to the merit

of certain facts there involved was properly overruled by the Eighth Circuit.

2. Whether the pending action was properly removed by the respondents on the grounds of (i) federal jurisdiction over the subject matter of the state court petition which charged that the Board's reassignment of teachers was in violation of the Fourteenth Amendment to the United States Constitution and of designated federal statutes, and (ii) of the need to avoid a collateral attack in state court of the Consent Judgment entered by the District Court in the *Liddell* case which ordered the teachers' reassignment plan.

3. Whether the Courts below properly made adjudications in favor of the respondents directing the dismissal with prejudice of the original petition therein.

STATUTES INVOLVED

28 USC § 144. Bias or prejudice of judge

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

As amended May 24, 1949, c. 139, § 65, 63 Stat. 99.

28 USC § 455. Disqualification of justice, judge, magistrate, or referee in bankruptcy

(a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, magistrate, or referee in bankruptcy shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

As amended Dec. 5, 1974, Pub.L. 93-512, § 1, 88 Stat. 1609.

28 USC § 1331. Federal question; Amount in Controversy; Costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

28 USC § 1441. Actions Removable Generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be remov-

able without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

As amended Oct. 21, 1976, Pub.L. 94-583, § 6, 90 Stat. 2898.

28 USC § 1443. Civil Rights Cases

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

28 USC § 1446. Procedure for Removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

(b) The petition for removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

(c) The petition for removal of a criminal prosecution may be filed at any time before trial.

(d) Each petition for removal of a civil action or proceeding, except a petition in behalf of the United States, shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

(e) Promptly after the filing of such petition and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(f) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such State court.

28 USC § 1653. Amendment of Pleadings to Show Jurisdiction.

Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts. June 25, 1948, c. 646, 62 Stat. 944.

STATEMENT OF THE CASE

Petitioners' action is an offshoot of the St. Louis schools desegregation case, captioned *Liddell, et al. v. Board of Education, et al.*, Cause No. 72-100 C (1), which has been pending in the United States District Court of the Eastern District, Eastern Division of Missouri since February 18, 1972. This suit was instituted by black parents and their minor children attending the public schools of the City of St. Louis, on behalf of themselves and all their children and parents similarly situated. The complaint in *Liddell* charged the Board of Education and its administrators with racial segregation and discrimination in the operation of the St. Louis Public School System as the natural and foreseeable effect of the assignment of students and teachers, the allocation of educational resources, and buildings.

On December 24, 1975, James H. Meredith, Chief Judge of the United States District Court who had presided over the case since its inception entered the Consent Judgment and Decree which adjudicated the then pending issues upon terms agreed to by the parties (R. App. A).* The Consent Judgment and Decree required a number of steps to be taken by the Board of Education with regard to personnel, location of schools, reduction of racial isolation in the academic high schools and establishing elementary and secondary magnet schools all in an effort to reduce racial isolation in the St. Louis Public School System.

Of primary import in the present case are paragraphs 5 and 6 of the *Liddell* Consent Judgment and Decree, which are set forth in full herein.

> "5. With regard to the personnel of the St. Louis Public Schools, the defendants are directed and ordered to take the following measures which are necessary or proper in order to reduce racial segregation:
>
> (a) Effective before the beginning of 1976-77 school year, defendants shall have planned, developed and carried out a program through volunteers and, if necessary, through mandatory appointments and assignments, to provide a minimum of two regular classroom teachers and no less than 10% of the minority teachers and other staff of either race in each school of the system.
>
> (b) The minimum percentages provided for in the preceding paragraph shall be increased by the defendants by no less than 20% of the minority teachers and other staff of either race in each school of the system before the beginning of the 1977-78 school

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* References to Respondents' Appendix will be indicated as "R. App. . . ." and references to Petitioners' Appendix as "A-. . .".

year, and to 30% of the teachers and other staff before the beginning of the 1978-79 school year.

6. The measures required to be taken by the Board under the provisions of paragraph 5 hereof shall be taken notwithstanding any already assigned and approved contracts; and the tenure or seniority of teachers or other certificated personnel shall not be used to excuse or justify any lack of compliance with the provisions hereof."

The implementation of these provisions of the Consent Judgment and Decree was started immediately after its entry by the district court and has been carried out in accordance with the time schedule set out therein, with minor modifications approved by the district court.

On the same day that the Judgment was entered, the District Court also issued an order that notice of the Judgment be published advising all members of the class and other interested parties that they could file objections to the Judgment and that a hearing would be held on such objections on January 23, 1976.

On January 16, 1976 objections to the Judgment were filed by the Missouri State Teachers' Association, by the St. Louis Teachers' Union Local 420 and others (R. App. B). After a hearing, these objections were overruled by the District Court but neither of the teacher organizations on behalf of themselves or their membership sought to appeal from that ruling or to participate in the proceedings for intervention which were filed by the NAACP (R. App. B). The appeal from the District Court's denial of the intervention application of the NAACP was sustained by the Eighth Circuit Court of Appeals in an opinion written by Circuit Judge Donald P. Lay with Circuit Judge Myron H. Bright and Senior District Judge Talbot Smith, Eastern District of Michigan, on the panel. The style of the case was *Liddell, et al. and Board of Education v. Caldwell, et al.*, 546 F.2d 768 (8th Cir. 1976) (R. App. C), motion to stay mandate denied 553 F.2d 557 (8th Cir. 1977) (R. App. D).

On or about February 2, 1977, these respondents applied to Mr. Justice Blackmun, Circuit Justice for the Eighth Circuit, to vacate the mandate of the appellate court. The Application, which was docketed under No. A-643, was denied by an equally divided Court on February 22, 1977 (Mr. Justice Marshall taking no part in the matter), 429 U.S. 1086 (1977).

Thereafter, the Board of Education filed its petition for certiorari which was docketed as No. 76-1411 in this Court. The petition was denied on June 27, 1977, 433 U.S. 914.

As it was done in the 1976-77 and 1977-78 school years, so when the 1978-79 school year approached the Board undertook to make assignments and transfers of teachers and other staff in order to comply with the last provision of paragraph 5(b) of the Consent Judgment and Decree. After these transfers were announced, and more than six years after the *Liddell* case had been instituted, the petitioners, who had refrained from intervening on either of the two occasions on which the District Court had given notice to all interested parties of their opportunity to be heard, chose to institute the instant suit.

Their petition was filed in the Circuit Court of the City of St. Louis on or about June 12, 1978 (A-1-14). Six of the nine named plaintiffs are teachers, of whom three were members of the Union Local 420 and two were members of the St. Louis Teachers' Association and the time the Consent Judgment and Decree was entered and objections to it were heard by the district court in the *Liddell* case. Two of the plaintiffs are black, and the rest are white (affidavit of Burchard Neel, associate superintendent in charge of personnel, St. Louis public schools, A-44).

The petition below seeks a declaratory judgment that the Board's actions in transferring and assigning employees in com-

pliance with the Consent Judgment and Decree are "illegal, invalid, and unconstitutional, and contrary to the laws of the State of Missouri, the United States, and the City of St. Louis." (A-9). Among the federal statutes pleaded by Murphy, et al. in this connection are 42 U.S.C. §§ 1981, 1983 and 2000e-2 (text set out at A-5). Count II of the petition prays for a restraining order prohibiting the transfers mentioned above, and Count III seeks damages in the amount of $10,000,000.00.

The petition was timely removed by the Board on June 23, 1978, and an amendment by interlineation of the removal petition was granted by the District Court on July 10, 1978 (A-35-37).

The Board's Motion to Dismiss with an accompanying affidavit was also filed on July 10, 1978 (A-38-45). In the motion, the Board asked the court to take judicial notice of the Consent Judgment and Decree in the *Liddell* case and the Board's obligations thereunder (R. App. A). The Board urged the dismissal of this action since the acts complained of were mandated by that Judgment.

Judge Meredith denied the petitioners' Motion to Remand and sustained the Board's Motion to Dismiss on August 11, 1978 (A-47-51). Petitioners appealed to the Eighth Circuit and, when the composition of the panel was announced, filed a Motion to recuse the two Circuit Judges on the panel, Donald P. Lay and Myron H. Bright. The stated ground is their alleged prejudice concerning the Board and evidenced in their decision (i) granting the intervention of the NAACP on December 13, 1976 and (ii) directing the district court to adopt a time schedule for objections (A-52-54). The latter point is apparently abandoned in the proceeding before this Court. Petitioners' motion was duly denied on January 5, 1979 (A-55). After argument, the appellate court, per curiam, affirmed the judgment below on January 19, 1979 (A-56). Motion for Rehearing En Banc was denied on February 6, 1979 (A-57).

ARGUMENT

I. No Conflict With Any Circuit Is Shown Regarding the Denial of Petitioners' Motion for Recusal of Two Eighth Circuit Judges and Said Motion Has No Basis in Fact or in Law.

The main charge raised in the instant petition is that two of the three Judges on the appellate panel to which this case was assigned "improperly failed to recuse themselves in violation of 28 U.S.C. 455" (petition for certiorari, p. 9).

This charge is serious on its face, but is utterly wanting in facts and in law. The alleged facts, which should be the foundation for the charge and argument, are not pointed out with the clarity and directness which would appear required. Seemingly the facts supporting these charges are set out at pages 16 and 17 of the petition and consist of two excerpts from the opinion of the Eighth Circuit in the NAACP intervention proceedings, 546 F.2d 768 (8th Cir. 1976) *cert. den.* 433 U.S. 914 (1977).

The first statement is quoted by petitioners as follows:

> "The parties were faced with an admittedly de jure segregated school system whose district lines had been coterminus with those of the city since 1876." *Liddell v. Caldwell,* 546 F.2d at 772.

The second quotation presented by petitioners states:

> "As we stated earlier, we do not believe that the merits of the Consent Decree are before us, since we consider the decree interlocutory in nature. We do observe, however, that if the overall plan to be submitted by the board contains major deficiencies in the respects asserted, the plan will encounter serious constitutional objection." *Ibid.* at 773.

As to the first quotation, it is true that prior to *Brown* the St. Louis School System was segregated as a result of constitutional and statutory provisions of the State of Missouri. The statement of the appellate court is unclear as to what time period was intended, but the sole issue for decision by the Eighth Circuit in that proceeding was whether or not the NAACP should be allowed to intervene. Hence the court's comments on other matters such as those referred to in the quoted passages of the opinion were purely *obiter dictum*. The appellate court itself took the unusual step to point out in its Order of January 28, 1977 that its holding was limited to the "only issue" of the NAACP intervention, 553 F.2d 557 (8th Cir. 1977) (R. App. D p. 2, our emphasis).

Concerning the second statement cited by petitioners as evidencing the Judges' prejudice, no such statement appears in Petitioners' Motion for Recusal, which is printed at A-52-53, and limits the scope of the issue which petitioners may present to this Court. On the other hand, the second statement relied upon in that motion is not found in petitioners' presentation of the issue at pages 16-17 of their petition. Thus, it would appear that at least 50% of petitioners' argument is not even before this Court.

Secondly, as petitioners themselves note, Section 455 of Title 28 is construed by the Fifth Circuit in *Davis v. Bd. of School Commissioners of Mobile County*, 517 F.2d 1044, 1052 (5th Cir. 1975), as concerned with "conduct extra judicial in nature as distinguished from conduct within the judicial context". In the situation at issue here, petitioners have failed to suggest any extra judicial conduct of any kind on the part of the two Judges. See also *U.S. v. Jeffers*, 532 F.2d 1101, 1112 (7th Cir. 1976), and *U.S. v. Mitchell*, 377 F.Supp. 1312, 1320 (D.D.C. 1974), *affm'd sub. nom., Mitchell v. Sirica*, 502 F.2d 375 (D.C.C. 1974), *cert denied* 418 U.S. 955 (1974).

Thirdly, petitioners' charge fails because as alleged in their Motion for Recusal the prejudice asserted is against the Board of Education, and not against petitioners themselves. The two entities can hardly be considered as interchangeable: the present suit and that they filed shows the petitioners as plaintiffs and the Board with its key administrators as the defendants. How could plaintiffs complain of judicial prejudice *against* the parties they are suing as defendants? Title 28 U.S.C. § 144 provides for the withdrawal of a judge before whom a matter is pending upon a showing by affidavit of a party that the judge "has a personal bias or prejudice either against him or in favor of any adverse party". This statute was not superseded by 28 U.S.C. § 455, but both statutes are to be construed in pari materia as held in *Davis v. Board of School Commissioners of Mobile County*, 517 F.2d 1044, l.c. 1051-1053 (5th Cir. 1975), quoted by petitioners at pages 14-15 of their petition here. The Motion for Recusal, which sets the parameters for this review, pleads prejudice by the two judges concerning the Board of Education as allegedly evidenced in some language of the Opinion. That prejudice can hardly be in favor of the Board which lost the appeal proceeding and applied to this Court for certiorari to the Eighth Circuit. The particular statement of the Eighth Circuit Opinion relied upon by petitioners as indicative of prejudice is certainly not indicative of prejudice in favor of the Board.

Hence petitioners must mean prejudice against the Board. But the Board is an adverse party in this case and since the petitioners were not parties to the 1976 appellate proceeding in *Liddell* before the Eighth Circuit, the statute does not warrant the recusal petition at issue here.

Fourthly, the decisions quoted and relied upon by the petitioners do not support their contentions. For example, in *U.S. v. Cowden*, 545 F.2d 257 (1st Cir. 1977), it was held that "a judge need not recuse himself based on the fact that he

presided over the two prior trials of four co-defendants" (Petition p. 13). A fortiori if such background is no ground for recusal, that decision can hardly be invoked as a precedent to require recusal here because of a procedural ruling on intervention while the merits of the case had been specifically excluded from review (R. App. D).

It is clear that petitioners have failed to adduce any facts or law which supports their position. Far less did petitioners show a conflict of decisions or any overriding points of alleged importance.

II. No Conflict Is Shown by Petitioners Regarding the Rulings Below on the Removal in This Case Whereby the Circuit Court Affirmed the District Court in Protecting Its Jurisdiction Over the Main Case and Overruling Petitioners' Attempt to Collaterally Attack Its Judgment in Another Forum.

Petitioners' question concerning the removability of the original petition in state court is answered by the clear provisions of 28 U.S.C. § 1441. Subsection (a) of that section provides in part that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant . . ." Subsection (b) states in part that actions arising out of the Constitution or laws of the United States "shall be removable." Subsection (c) of § 1441 further provides that when "a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed . . ." Thus, the single issue regarding whether or not removal of this case was proper is "whether this Court would have original jurisdiction of any of the plaintiffs' claims" (Memorandum of Judge Meredith, dated August 11, 1978, A-46). Despite petitioners' suggestion to the contrary,

§ 1441(c) does not limit removability under subsections (a) or (b) but clearly provides that the district court, in its discretion, may take jurisdiction over non-federal claims if they are joined with federal claims. 14 Wright, Miller & Cooper, *Federal Practice and Procedure*, Jurisdiction, Section 3722, page 546.

Petitioners' argument against removability by reason of Section 1441(c) is wrong. In essence, while petitioners claim a violation of federal law, they argue that since state law violations are also alleged the case cannot be removed because there are not "separable and independent claims." Certainly, petitioners' charges of state law violations are independent from the claims of breach of federal statutes and the federal Constitution. If not, the entire case is removable under Sections 1441 (a) and 1441(b) as well as the principles of pendent jurisdiction. 14 Wright, Miller & Cooper, *Federal Practice and Procedure*, Jurisdiction, Section 3724, pages 648-649.

The petition filed by the petitioners in this case complains of alleged violations of Section 296.020 R.S.Mo. and St. Louis City ordinances, Nos. 51512 and 57173. The petition also charges violations of Federal law, the Fourteenth Amendment, 42 U.S.C. §§ 1981, 1983 and 2000e-2. Indeed, those sections are quoted verbatim in the petitioners' petition as filed in the State court (A-3-4, A-6-7). The acts complained of by the petitioners consist of the assignment, reassignment and transfer of employees which petitioners charge to be violations of the Fourteenth Amendment as well as of the federal civil rights statutes which create the causes of action asserted by the petitioners.

The prayer of the petition asks for a declaratory judgment stating that the actions, policies and practices of the Board are "illegal, invalid, and unconstitutional, and contrary to the laws of the State of Missouri, the United States and the City of St.

Louis" (Petition, page 9). Plaintiffs also ask for injunctive relief because of these alleged violations and seek damages in the amount of $10,000,000.00.

28 U.S.C. § 1343(3) and (4) state:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> * * * * * * *
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
>
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

The position of the petitioners that no federal jurisdiction obtains here is extraordinary. In this matter petitioners seek redress for alleged deprivation of rights secured by the Constitution of the United States and by Acts of Congress. They also seek to recover damages and to secure equitable relief under numerous Acts of Congress providing for the protection of civil rights. The Board is a creature of state statutes and thus its actions, policies and practices are obviously under color of state law. Clearly, therefore, the district court had jurisdiction over plaintiffs' claims based upon 42 U.S.C. §§ 1981 and 1983 and the Fourteenth Amendment by reason of 28 U.S.C. § 1343(3)(4).

It is true that the original petition for removal filed by respondents in the federal court did not refer to 28 U.S.C. § 1343(3) and (4). Even so, jurisdiction existed, and removal was proper.

Petitioners challenge the order of removal on the ground that the petition was inadequate without the amendment and that the amendment was improperly granted after the return date for the show cause order issued ex parte by the state court (A-33-34). Petitioners are in error on both points. Significantly no citations whatsoever are furnished by petitioners. Further, petitioners in the same breath ask this Court to determine the permissibility of the procedure below and then abandon the point without discussion, assume the permissibility of the procedures and address the issue of "separate" causes of action (petition for certiorari, p. 18).

Removal was proper and federal jurisdiction existed even without the amendment. See e.g., *Concerned Citizens for Neighborhood School, Inc. v. Board of Education of Chattanooga, Tennessee*, 379 F.Supp. 1233, 1235 (E.D.Tenn. 1974).

Secondly, the removal petition was properly and timely amended. It was filed on June 23, 1978, three days after the service of the *Murphy* petition in state court. The amendment was made by leave of court on July 10, 1978—all within the 30-day period provided in 28 U.S.C. § 1446. It certainly was proper to amend the petition for removal, particularly when the amendment was made within the time period prescribed for the filing of a petition for removal. 28 U.S.C. § 1653. See also *Alexander v. Missouri-Kansas-Texas Railroad Co.*, 221 F.Supp. 897 (W.D.Mo. 1963).

Petitioners' reliance on the return date under the show cause order of the state court as invalidating the amendment granted subsequent thereto is misplaced. 28 U.S.C. § 1446(e) provides that:

> "Promptly after the filing of such petition for the removal of a civil action and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall

file a copy of the petition with the clerk of such State court, which shall effect the removal and *the State court shall proceed no further unless and until the case is remanded.*"

(Emphasis added).

Pursuant to the federal statute the state court loses jurisdiction of the case upon the petition for removal having been filed and served. Clearly this suspension of jurisdiction affects also a collateral matter such as the show cause order involved here. If the arm of a judge whose authority is suspended by federal intervention could block the operation of federal proceedings by orders issued prior to the removal, the removal statutes would be impaired and restrained. See, *Adair Pipeline Company v. Pipeliners Local Union No. 798*, 203 F.Supp. 434, 437 (S.D. Texas 1962), *aff'd*, 325 F.2d 206 (5th Cir. 1963); *Lowe v. Jacobs*, 243 F.2d 432, 433 (5th Cir. 1957), *cert. den.*, 355 U.S. 842 (1957); 14 Wright, Miller & Cooper, *Federal Practice and Procedure*, Jurisdiction, § 3737, p. 743 n. 7; 1A *Moore's Federal Practice*, ¶ 0.168[3.-8], p. 511 n. 24.

Since the petitioners clearly base their purported cause of action upon rights enumerated in the Fourteenth Amendment and various civil rights statutes under federal law, those federal claims may be removed. Here the district court properly removed the entire case and decided all issues in plaintiffs' petition. *Watkins v. Grover*, 508 F.2d 920, 921 (9th Cir. 1974) and cases cited therein; *Gully v. First National Bank in Meridian*, 299 U.S. 109 (1936).

28 U.S.C. § 1331(a) provides in part:

"The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States . . ."

Here again it is clear that there is a federal question since the purported violations complained of arise under the Fourteenth Amendment and several federal civil rights laws.

Moreover, the very authority of the federal district court to enter the Consent Judgment and Decree in the *Liddell* case and the Board's adherence to that Decree is under attack by the petitioners.

The Eighth Circuit in its Order of January 28, 1977 stated: "This court views the consent decree, although interlocutory as to remedy, still obligatory on the respective parties to go forward with implementation of a desegregation plan; . . ." 553 F.2d 557 (8th Cir. 1977) (R. App. D). Similar rulings regarding the obligatory nature of the consent decree were made by Judge Meredith in the course of subsequent proceedings, and were reaffirmed in his after-trial judgment of April 12, 1979 (R. App. E).

Clearly, petitioners have failed to carry their burden that their collateral attack instituted in a state court should be allowed to proceed, in violation of the rules of procedure and substance that govern the orderly administration of the judicial process in this federal system.

Situations, such as presented here where dissatisfied parents, teachers and school children collaterally attack federal desegregation issues in a state forum, are not unusual. When such suits are filed in state court, they may be removed. See for example, *Bohlander v. Independent School District No. 1 of Tulsa County, Oklahoma*, 420 F.2d 693 (10th Cir. 1969) (state action seeking to enjoin actions attempting to carry out the directions of the federal court in desegregation cases are removable); *Burns v. Board of School Commissioners of City of Indianapolis, Indiana*, 302 F.Supp. 309, 311 (S.D.Ind. 1969) *aff'd* 437 F.2d 1143 (7th Cir. 1971) (state action seeking to

enjoin teacher transfers contemplated for following school years in desegregation matter); *Bridgeport Educational Association v. Zinner*, 415 F.Supp. 715 (D. Conn. 1976) (removal of action seeking to enjoin orders in desegregation cases proper); *Grenchik v. Mandel*, 373 F.Supp. 1298 (D. Md. 1973) (district court enjoined state prosecution seeking to stop implementation of certain aspects of desegregation decree).

The district court clearly had original jurisdiction over plaintiffs' claims in this matter, denied petitioners' motion to remand, and within its discretion, retained jurisdiction of the state law claims.

III. **No Conflict Among the Circuits Is Even Suggested by Petitioners, and the Rule That a Court May Take Judicial Notice of Its Own Open File, as Applied in This Case, Is Nowhere Impeached by Petitioners' Argument.**

The gravamen of the Murphy petition filed in the state forum is that the Board had violated and is violating the Fourteenth Amendment to the United States Constitution and various federal civil rights acts by reassigning teachers and other staff personnel on the basis of race. The petition alleges that the reassignments contemplated by the Board at the beginning of the 1978-79 school year would involve about 648 employees out of a total of 7,000 (Petition, paragraph 22, A-28).

Petitioners challenge the very actions taken by the Board in order to comply with the specific provisions of paragraph 5 of the Consent Judgment and Decree which ordered the Board to affirmatively act to reduce racial isolation of personnel in the St. Louis school system and set the required parameters (R. App. A).

Next, petitioners seem to imply that there was something improper in Judge Meredith applying the doctrine of judicial notice of his own file in the then pending *Liddell* case. But the

appellate court's affirmance of the judgment discussing the Murphy petition is nowhere shown to be in conflict with other cases. Indeed, there is no such conflict. See, e.g., *Shuttlesworth v. Birmingham*, 394 U.S. 147, 157 (1969); *National Fire Insurance Co. v. Thompson*, 281 U.S. 331, 336 (1930); *Randy's Studebaker Sales, Inc. v. Nissan Motor Corp.*, 533 F.2d 510, 521 (10th Cir. 1976); *State of Florida Board of Trustees v. Toppino & Sons*, 514 F.2d 700, 704 (5th Cir. 1975), and *Kern v. Tri-State Insurance Company*, 386 F.2d 754, 755 (8th Cir. 1968).

In the present case, the whole effort of the 7 white and 2 black Murphy petitioners is to escape the application of the Consent Judgment and Decree. No wonder they do not seek to appear before the Judge who made that momentous decision in the history of the St. Louis public school system. The Judge also knows full well that the Union Local 420 and the St. Louis Teachers' Association, of which in the aggregate 5 of the petitioners were members, filed written objections to, and argued against, the Consent Judgment and Decree at the hearing on January 21, 1976 (R. App. B). Hence the applicability of the judicial notice doctrine to the instant case is enhanced and made specially appropriate for the reason that here is a federal judge protecting the integrity and enforcement of his prior judgment from a collateral attack, which is as procedurally belated as it is unfounded on the merits.

Petitioners "concede" that the district court could have treated respondents' motion under Rule 12 (b) (6) as a motion for summary judgment under Rule 56. But petitioners contend that the district judge did not elect to do so, hence his conclusion and that of the affirming court of appeals are erroneous.

Suffice it to say, Rule 12(b) mandates that such a motion shall be treated as one for summary judgment when matters outside the pleadings are presented to and not excluded by the court. Here, matters outside the pleadings (affidavit of Burchard

Neel, A-44-45 and judicially noticed matters) were considered. The motion was treated as one for summary judgment and Judge Meredith ruled on the merits of the case.

It is well established that erroneous nomenclature does not prevent the court from recognizing the true nature of a motion, and motions to dismiss have been treated as motions for summary judgment by the appellate courts: see, e.g., *Owen v. Kronheim, Jr.*, 304 F.2d 957 (D. C. C. 1962); *Central Contracting Company v. Maryland Casualty Company*, 367 F.2d 341, 343 (3rd Cir. 1966); and *Dorado v. Kerr*, 454 F.2d 892, 896 (9th Cir. 1972), *cert. den.* 409 U.S. 934.

Moreover, reassignments with race being a factor in the determination of such reassignments in a desegregation program which is voluntarily undertaken by a Board of Education is proper and recognized by this Court to be proper. *McDaniel v. Barresi*, 402 U.S. 39, 41 (1971). While the case of *McDaniel v. Barresi* involved students rather than employees as here, the rationale remains the same.

In the case of *Kolz v. Board of Education of the City of Chicago*, 576 F.2d 747 (7th Cir. 1978), the Court approved the district court who had denied plaintiffs-teachers injunctive relief and noted that: "the plaintiffs had failed to establish deprivation of significant constitution rights, that is, that there is no constitutional right to a teaching position in a particular location." 576 F.2d at 748. The Court further stated there was no probability of success on an equal protection claim where the Board had the discretion to transfer teachers. 576 F.2d at 749, n.2. The same broad discretion is vested in the St. Louis School Board. Section 168.211(2) R.S.Mo. 1969. This point is significantly more cogent in view of the fact that the transfers involved were not only done within the discretionary powers of the Board of Education but by specific order of the district court in the *Liddell* case.

Petitioners' claim of an equal protection violation in the instant case is also invalidated by the fact that there are both black and white employees in the class of plaintiffs (R. App. A-44-45). Furthermore, petitioners purport to represent each and every employee, black and white, in the entire school system (Petition, par. 24, A-28).

The petitioners' position here is a blatant effort to collaterally attack the Consent Judgment and Decree entered by the district court in the *Liddell* matter. Their argument at pages 28-29 of their brief that the two courts below ruled that the petitioners were barred by laches misreads the district court's order affirmed by the Eighth Circuit. In 1976, the plaintiffs had the opportunity to object to the Consent Judgment and Decree including paragraphs 5 and 6 thereto. The district court ordered the publication of a notice containing the text of the proposed decree and gave all interested parties, including these plaintiffs, an opportunity to file objections and to be heard at a hearing on January 23, 1976 (R. App. B). The district court further ordered that the Board adopt the policy of transfer of personnel which was worked out in consultation with the teachers' union and filed in the district court in the *Liddell* case on March 15, 1976 (R. App. B, entry 1/23/1976). No appeal has ever been taken by any of the teacher groups, by any individual teacher, or by any interested party. To reopen the issues of staff balance which were concluded in December, 1975, with implementation completed as to phase I (1976-77) and phase II (1977-78) and in the course of completion as to phase III (1978-79) would be to ask the Court "to grind the same corn a second time." *Aloe Creme Laboratories v. Francine Co.*, 425 F.2d 1295 (5th Cir. 1970).

The Consent Judgment and Decree is presently in effect, and its vitality and binding nature were recently confirmed in the Findings, Conclusions of Law and Judgment rendered by Judge Meredith on April 12, 1979 (R. App. E). The *Liddell* case

and the plans submitted pursuant to the Consent Decree were pending before the district court at the time the *Murphy* suit was instituted. If the petitioners really believed that the Board had failed to comply with the terms of the Decree, and particularly the mandate to the Board to affirmatively act to reduce racial isolation in the St. Louis School System's staff, the logical forum was before the district court in the *Liddell* case, not an independent state court action attacking the district court's order. To allow the prosecution of separate actions attacking the very substance of the Consent Judgment and Decree entered by the district court is not only an attack upon the very integrity of the jurisdiction of the district court and the Court of Appeals for the Eighth Circuit but could result in inconsistent standards and interpretation.

A case similar to that presented here is *Black and White Children of Pontiac School System v. School District of the City of Pontiac*, 464 F.2d 1030 (6th Cir. 1972). In that case, the plaintiffs sought to enjoin the implementation of a prior order. The Court of Appeals for the Sixth Circuit affirmed the dismissal of the complaint on the ground that the plaintiffs' suit was nothing more than an attempt to collaterally attack the district court's prior order in the pending desegregation suit. This is exactly what the plaintiffs seek to do here and the dismissal of the suit and the affirmance of that dismissal was proper.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari to the court below should be denied.

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APPENDIX

RESPONDENTS' APPENDIX A

In the United States District Court for the
Eastern District of Missouri
Eastern Division

Craton Liddell, a Minor, et al.,
Plaintiffs,
vs.
The Board of Education of the City of St. Louis, State of Missouri, et al.,
Defendants.
No. 72C 100(1).

CONSENT JUDGMENT AND DECREE

On this 24th day of December, 1975, the parties hereto having appeared by counsel, and having consented, in the interest of the settlement of this litigation, as well as in the interest of saving the time, burden and expense of further hearings, subject to the approval of the Court, to the making and entering of this Judgment, as per memorandum filed herein under the date hereof, it is hereby

ORDERED, ADJUDGED AND DECREED that:

1. This Court has jurisdiction of the subject matter of this class action and of the parties hereto.

2. This Judgment and Decree is made and entered upon the Stipulation of Facts as amended and supplemented and upon the consent of the parties.

3. Nothing herein contained shall be deemed to be an admission on the part of defendants that the charges contained in plaintiff's Complaint, as amended, are true. However, notwith-

standing the actions taken by the Board subsequent to *Brown v. Board of Education of Topeka*, 347 U.S. 483, as of this date hereof, segregation is present, as a matter of fact, in the Public School System of the City of St. Louis, in the particulars itemized in said Stipulation of Facts.

4. Defendants, their agents, officers, employees and successors, and all those in active concert and participation with them shall be enjoined and prohibited from discriminating on the basis of race or color in the operation of the School District of the City of St. Louis, and shall be required to take affirmative action to secure unto plaintiffs their right to attend racially nonsegregated and nondiscriminatory schools, and defendants will afford unto plaintiffs equal opportunities for an education in a nonsegregated and nondiscriminatory school district, and shall be required to take the affirmative action hereinafter set forth.

5. With regard to the personnel of the St. Louis public schools, the defendants are directed and ordered to take the following measures which are necessary or proper in order to reduce racial segregation:

a) Effective before the beginning of the 1976-1977 school year, defendants shall have planned, developed and carried out a program through volunteers and, if necessary, through mandatory appointments and assignments, to provide a minimum of two regular classroom teachers and no less than 10% of the minority teachers and other staff of either race in each school of the system.

b) The minimum percentages provided for in the preceding paragraph shall be increased by defendant to no less than 20% of the minority teachers and other staff of either race in each school of the system before the beginning of the 1977-1978 school year, and to 30% of the teachers and other staff before the beginning of the 1978-1979 school year.

6. The measures required to be taken by the Board under the provisions of paragraph 5 hereof shall be taken notwithstanding any already signed and approved contract; and the tenure or seniority of teachers or other certificated personnel shall not be used to excuse or justify any lack of compliance with the provisions hereof.

7. Employees of the Board, whether certificated or not, shall not be discriminated against as to hiring, rehiring, promotion, dismissal, suspension or assignment on the ground of race or color, all subject to the procedural provisions of Title VII of the Civil Rights Act of 1964, as amended.

8. To the extent which is consistent with the proper operation of the school system as a whole, defendants shall locate any new schools, lease new classroom facilities or substantially expand existing schools with the objective of eradicating the effects of past and present segregation in the publis schools of the City of St. Louis.

9. Before the beginning of the 1977-1978 school year, defendants shall make a study of realignments of all elementary feeder schools to the academic high schools for the purpose of reducing racial isolation and segregation at the said high schools, and shall submit a report thereon to the Court, on or before January 15, 1977, with implementation to begin September 1977.

10. The defendants are hereby ordered to make a study and report to the Court on or before May 1, 1976 as to whether or not the following items will assist in eliminating or reducing segregation:

a) Establishing elementary magnet schools with specialized curriculum, having an open enrollment by application.

b) Establishing high schools for the study of the visual and performing arts, for the study of mathematics and physical and

natural sciences, and other subject areas, such schools having open enrollment by city-wide application.

c) Recognizing that the above measures are basically experimental in nature, a study of the feasibility of curriculum improvements or other changes that should be instituted in the system as a whole shall be undertaken for the purpose of increasing the quality of education throughout the system, all within the context of reducing racial isolation in the schools and with the goal of desegregating the school system. A report shall be made to the Court by May 1, 1976, with implementation beginning with the school year 1976-1977.

11. Defendants are required to file with the Court, within sixty days from the opening day of the 1976-1977 school year a report setting forth the following information:

a) Tabulation by race of the enrollment in each school of the district.

b) List of each student, by name and address, who applied for transfer stating whether the application was granted, or, if not, the reason for the denial.

c) Tabulation of teachers by race for each school, listing the assigned grade or grades, and the vacancies which have been filled by the hiring of teachers from outside the system at each of the schools.

12. Defendants shall simultaneously mail copies of all reports filed with the Court to counsel for the plaintiffs. Plaintiffs' counsel shall be advised as to actions undertaken by the defendants in compliance with this Judgment.

13. Costs shall be taxed against the defendant Board of Education of the City of St. Louis and a reasonable attorneys' fee and expenses will be allowed against it and in favor of counsel for the plaintiffs.

14. Jurisdiction is retained for the purpose of enabling any of the parties to this Judgment to apply to this Court at any

time for such further orders and directives as may be necessary or appropriate for the construction or carrying out of this Judgment.

Dated this 24th day of December, 1975.

/s/ James H. Meredith
U. S. District Judge

A TRUE COPY OF THE ORIGINAL

Filed 12-24-75

Attest: William D. Rund, Clerk
By Phillip Swihart

Dated: 4-26-79
St. Louis, Mo.

RESPONDENTS' APPENDIX B

United States District Court for the
Eastern District of Missouri

I, William D. Rund, Clerk of the United States District Court for the Eastern District of Missouri, and keeper of the records and seal thereof, hereby certify that the documents attached hereto are true copies of pages 5 and 6 of the Civil Docket Sheet for Case No. 72-100 C (1) Craton Liddell, et al. v. Board of Education, et al. now remaining among the records of the Court.

In testimony whereof I hereunto sign my name and affix the seal of said Court, in said District, at St. Louis, Mo., this 25th day of April 1979.

WILLIAM D. RUND
Clerk

I, James H. Meredith, United States District Judge for the Eastern District of Missouri, do hereby certify that William D. Rund, whose name is above written and subscribed, is and was at the date thereof, Clerk of said Court, duly appointed and sworn, and keeper of the records and seal thereof, and that the above certificate by him made, and his attestation or record thereof, is in due form of law.

April 25, 1979

/s/ J. H. MEREDITH
(Seal) United States District Judge

I, William D. Rund, Clerk of the United States District Court for the Eastern District of Missouri, and keeper of the seal thereof, hereby certify that the Honorable James H. Meredith

whose name is within written and subscribed, was on the 25th day of April 1979, and now is Judge of said court, duly appointed, confirmed, sworn, and qualified; and that I am well acquainted with his handwriting and official signature and know and hereby certify the same within written to be his.

In testimony whereof I hereunto sign my name, and affix the seal of said Court at the city of St. Louis, in said State, on the 25th day of April, 1979.

WILLIAM D. RUND
Clerk

Date	Proceedings
1975	
Oct. 20	By leave, defts Board of Education, et al., replace Exhibit 47 with a revised exhibit also identified as defts' Exhibits 47.
Nov. 13	Data as to the Racial Composition of the student body, teaching and non-teaching personnel in the St. Louis Public School System for the School Year 1975-76, fld.
Nov. 25	Data as to the racial composition of elementary and secondary student in the St. Louis Public School System who were bussed through the school year 1975-76, fld.
Dec. 3	By leave of Court, defts Board of Education, et al., amend Exhibit 47, p. 4, which was filed on 10/15/75 by interlineation. Data updating maps of bus transportation for overcrowding in elementary schools in St. Louis for the school years 1974-75 and 1975-76, and data concerning implementation by school year of the balanced staff policy, fld.

Dec. 23 Stipulation for amendment of pleadings, substitution of parties and entry of appearance of new parties, fld & SO ORDERED.

Dec. 24 Consent judgment & decree & notice thereof, fld. Defts shall be enjoined and prohibited from discriminating on the basis of race or color in the operation of the School District of the City of St. Louis, and shall be required to take affirmative action to secure unto plffs their right to attend racially nonsegregated and nondiscriminatory schools; effective before the beginning of the 1976-1977 school year, defts shall have planned, developed and carried out a program through volunteers and through mandatory appointments and assignments, to provide a minimum of two regular classroom teachers and no less than 10% of the minority teachers and other staff of either race in each school of the system, etc. Order fld. Plffs shall publish a notice in the St. Louis Daily Record, setting forth the text of the said proposed Consent Judgment and Decree and giving notice to all the prospective members of the class and other interested parties that anyone objecting to the said Consent Judgment and Decree shall file with the Court a statement of their objections in writing, etc. cc attys

1976

Jan. 13 Affidavit of publication in compliance with paragraph d) of the order of publication and notice entered into by this Court on Dec. 24, 1975, fld.

Jan. 16 Objections to the plan of desegregating the St. Louis Public Schools System fld by Missouri State Teachers Assn. Statement of St. Louis Teachers Assn to consent Judgment and decree entered on Dec. 24, 1975, fld.

Objections for the purpose of clarification of the consent judgment & decree of Dec. 24, 1975, made by St. Louis Teachers Union, Local 420, American Federation of Teachers along with supporting memo., fld.

Applicant's for Intervention's mtn to intervene as plffs and memorandum of points and authorities in support thereof, and objections to proposed consent decree, fld.

Jan. 16 Five sep. applications for appointment of next friend fld by Cedric Williams and Stephanie Williams, Earline Caldwell, Denise Daniels and Swayne Daniels, Janis Hutcherson, and Robert E. Smith.

Jan. 22 Mtn of defts to dismiss applications for intervention and objections to consent judgment and decree of Dec. 24, 1975, affidavit of Robert E. Wentz, & supporting memorandum, fld.

Jan. 23 Parties appear for hearing on any objections filed to Consent Judgment and Decree entered December 24, 1975. Mtn of plffs in opposition to applicants mtn for intervention to Consent Judgment and Decree of December 24, 1975, filed, together with suggestions & affidavits of Minnie Liddell and Barbara Goldsby, & attached exhibits in support thereof. Document, "To Whom It May Concern" signed by Parker Wheatley, Public Affairs Producer and Consultant, KMOX-TV, fld. Oral argument on objections heretofore filed to Consent Judgment and Decree & on applicant's mtn for intervention heretofore filed by NAACP, commenced & concluded & submitted. The objections heretofore filed to Consent Judgment & Decree are overruled and the application of the NAACP to intervene is denied as untimely. ORDER fld. Objections to the decree are DE-

NIED. School Board shall adopt a policy of transfer for personnel which shall be uniformly applied and shall be filed with the Court within thirty days from date. Mtn of the National Assn. for the Advancement of Colored People by its St. Louis Branch, along with certain minors, DENIED for the reason that the application is untimely. All interested parties desiring to be heard concerning this cause may from time to time file suggestions with the Court and be heard, cc attys

Feb. 5 Mtn for reasonable value of service fld by plffs.

Feb. 9 Transcript of Hearing on the mtn to intervene by the National Association for the Advancement of Colored People, fld.

Feb. 17 School Board granted 20 add'l days from Feb. 23, 1976, to file policy of transfer of personnel with the Court.

Feb. 18 Plff's mtn for reasonable value of service delivered to J. Meredith.

Feb. 20 NOTICE OF APPEAL—fld by NAACP & SPECIAL CONTRIBUTION FUND and Notice of App. & 2 Certified Copies of Docket Entries delivered to USCA (Feb. 23, 1976)

Mar. 15 Statement of policy of the Board of Education of the City of St. Louis of the transfer of personnel, fld.

Mar. 16 Services rendered by Dr. William B. Field, fld.

Mar. 19 Supplementary report services rendered by Dr. William B. Field, fld.

RESPONDENTS' APPENDIX C

United States Court of Appeals
For the Eighth Circuit

No. 76-1228

Craton Liddell, a minor, by Minnie Liddell, his mother and next friend, et al.,
Appellees,
and
The Board of Education of the City of St. Louis, State of Missouri, et al.,
Appellees,
v.
Earline Caldwell, a minor, by Lillie Caldwell, her mother and next friend, et al.,
Appellants.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: November 10, 1976
Filed: December 13, 1976

Before Lay and Bright, Circuit Judges, and Talbot Smith, District Judge.*

Lay, Circuit Judge.

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* Talbot Smith, Senior District Judge, Eastern District of Michigan, sitting by designation.

In February 1972 five black parents and their minor children who were enrolled in the public schools in the city of St. Louis, filed a class action on behalf of themselves and others similarly situated, charging racial segregation and discrimination in the operation of the St. Louis Public Schools. They named as defendants the Board of Education of the City of St. Louis, the board members, the superintendent and district superintendents of the school system. On October 3, 1973, after discovery proceedings by all parties, the trial court allowed the case to proceed as a class action. By public notice the court invited other interested parties to intervene on or before December 1, 1973. No one applied for intervention.[1]

On February 24, 1974, the court requested that the parties file a written stipulation of facts. This was done on June 7, 1974. Exhibits filed with the stipulation have been continually supplemented to provide statistical data for the school years up to 1975-1976. On December 24, 1975, the parties entered into a consent decree which was approved by the trial court, the Honorable James H. Meredith, presiding. At that time the court ordered publication of the judgment to advise all members of the class and other interested parties that they should file any objections thereto by January 16, 1976. Six black pupils, through their parents and friends, and the St. Louis Chapter of the NAACP filed objections and sought to intervene.[2] The original plaintiffs and defendants resisted both the objections and the intervention motion. Following a hearing, Judge Meredith overruled the objections. He denied the application for intervention on the grounds that it was untimely and that the class was adequately represented. He also found that the decree was adequate for the present time and gave all interested parties the opportunity to make additional suggestions to the court from time to time. A timely appeal was taken from that order.

[1] On October 30, 1973, defendants filed their motion for an order directing the plaintiffs to join as additional parties defendant the Governor, the Attorney General, the Commissioner of Education of the State of Missouri, the State Board of Education of Missouri, the St. Louis County Board of Education, the St. Louis County Superintendent of Education, and the twenty school districts in St. Louis County which constitute the first two tiers of school districts adjoining the defendant school district of the city of St. Louis. The motion was denied on December 1, 1973.

[2] On January 16, 1976, objections to the judgment were also filed by the Missouri State Teachers Association and by the St. Louis Teachers Union, Local 420. Neither of these organizations has sought intervention.

The only issue before us concerns the right of the appellants-petitioners to intervene. Although the petitioners urge us to pass upon the constitutional validity of the decree as well, we decline to do so for at least two reasons. First, the decree does not represent a plenary desegregation plan and concededly is interlocutory in scope. Second, the record is deficient as to investigation and scope of possible solutions and plans to implement an effective desegregation order within the St. Louis school system.

After reviewing the record, we conclude that the district court, which has retained jurisdiction of the case, erred in denying the appellants' motion to intervene. For the reasons stated, we do not pass upon the validity of the decree. Nonetheless, reference to the substance of the decree and to the claims of the respective parties is essential to the understanding of our ruling.

The petitioners seek intervention under Fed. R. Civ. P. 24 (a)(2).[3] Intervention of right is required under the rule when: (1) the petitioners assert an interest in the subject matter of the primary litigaiton; (2) there exists a possibility that the peti-

[3] Fed. R. Civ. P. 24(a)(2) reads as follows:

> (a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

tioners' interest will be impaired by the final disposition of the litigation; (3) there exists a danger of inadequate protection by the party representing the petitioners' interests; and (4) the petitioners have made timely application to intervene.

The parties generally agree that petitioners assert valid interests in the subject matter and that unless their interests are adequately represented those interests could be seriously harmed. We note public interest in the operation of a lawful school system and the fact that students and parents, regardless of race, have standing to challenge a *de jure* segregated school system. *See Johnson v. San Francisco Unified School Dist.*, 500 F.2d 349 (9th Cir. 1974); *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969). The denial of the motion to intervene in the present case rests on the alleged lack of timeliness and a finding that the class is already adequately represented.

Recent pronouncements by the Supreme Court[4] and this court[5] govern our consideration of petitioners' timeliness in seeking to intervene. The guiding factors include consideration of the progression of the suit, the reason for the delay, and the possible prejudice any delay due to intervention might cause the existing parties. More significant, however, is the rule that "[t]imeliness is to be determined from all the circumstances" of the case. *NAACP v. New York*, 413 U.S. 345, 366 (1973). Although precedents under Rule 24(a)(2) are helpful, each case must rise and fall on its own peculiar facts and circumstances.

In the present case, it is urged that the petitioners were given ample opportunity to participate in the case from the beginning and were, in fact, invited to intervene before December 1, 1973,

[4] *NAACP v. New York*, 413 U.S. 345 (1973).

[5] *National Farmers' Organization, Inc. v. Oliver*, 530 F.2d 815 (8th Cir. 1976); and *Nevilles v. EEOC*, 511 F.2d 303 (8th Cir. 1975).

by the trial court. Ordinarily this factor standing alone would weigh heavily toward our sustaining the trial court's discretion in declining a petition to intervene made some three years later. *See United States v. Associated Milk Producers, Inc.*, 534 F.2d 113 (8th Cir. 1976). However, in the present case other factors must also be considered.

First, the reason given by petitioners for their failure to intervene earlier is that they concurred with the initial claims, seeking desegregation of the St. Louis school system, asserted by the original plaintiffs. Petitioners claim that there was nothing at that time or at any other time until the consent decree appeared, to indicate to them that these shared claims were "being abandoned." Second, although the original complaint was filed in 1972, the present record is built upon stipulated facts which basically are not under attack; the stipulation appears to fairly set forth the basic history and statistics of the St. Louis school system. The petitioners do not attempt to assert a right to relitigate or undo the factual stipulations of the parties.[6] Third, the record indicates that a good deal of the delay from February 1972 to the time of the consent decree in December 1975 resulted from a stalemate between the parties as to how to achieve a plan of desegregation. Fourth, and of great significance to this court, is the fact that the district court, even as of this late date, has only partially approved specific plans for desegregation. The consent decree signed by the district court is interlocutory in nature, and as all agree, does not constitute the overall plan for desegregation. Under the district court order the school board is to make further study and must produce a "report" by January 15, 1977, with "implementation to begin September, 1977."

[6] There have been extensive discovery procedures culminating in the stipulation. However, we note that when the court originally invited other interested parties to intervene in October, 1973, a great portion of the discovery proceeding had already taken place.

The petitioners' primary purpose in seeking intervention relates to their objections to the proposed remedy, that is, to the ultimate plan of desegregation. The petitioners urge that the consent decree falls short of requiring a plan which would comply with the constitutional mandate to create a unitary school system for St. Louis.

Considering all of these circumstances, and in view of the fact that only partial steps toward implementing a unitary school system have taken place, we find the district court erred in denying the petition for intervention for lack timeliness. Although the time for developing a plan has long since passed, *cf. Carter v. W. Feliciana Parish School Bd.*, 396 U.S. 290 (1970), unfortunately it is readily apparent that the complete desegregation plan is still on the drawing board. The record demonstrates that the effects of the previous *de jure* school segregation are still fully visible within the St. Louis school system.

As a second reason for rejecting the petition for intervention, the trial court found that petitioners' interests are being adequately represented. This finding is vigorously defended by the original plaintiffs and just as vigorously disputed by petitioners.

The controlling rule here is that representation is adequate if there is no collusion between the representative and an opposing party; if the representative does not have or represent an interest adverse to the applicant; or if the representative does not fail in the fulfillment of his duty. *Stadin v. Union Electric Co.*, 309 F.2d 912 (8th Cir. 1962), *cert. denied*, 373 U.S. 915 (1963). *See also Martin v. Kalvar Corp.*, 411 F.2d 552 (5th Cir. 1969); *Peterson v. United States*, 41 F.R.D. 131 (D. Minn. 1966). Petitioners are apparently relying on the third alternative indicating inadequate representation—failure to fulfill duty. In finding that intervention should be allowed, we do not in any way impugn any element of bad faith to the original plaintiffs or the school board by their agreeing to the consent decree. We are confident that all parties, as well as Judge Meredith and the

community at large,[7] have strived in good faith to find a workable solution to the difficult problem before them.[8]

The parties were faced with an admittedly *de jure* segregated school system whose district lines have been coterminous with those of the city since 1876. The total student population for the school term of 1975-1976 was 88,499 with the ratio of students being approximately 70% black and 30% white. Out

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[7] The School Board urges that the consent decree received the overwhelming approval of both races in the community and strong endorsements of the various St. Louis newspapers. The supplemental appendix, containing several newspaper articles printed following issuance of the consent decree, supports this contention. On the other hand, the same articles offer statements which, if true, would seem to support petitioners' contention that the parties have abandoned their goal of obtaining a plan for desegregation. For example:

> *St. Louis Post-Dispatch*, December 24, 1975: "[T]he decree does not include any promises of specific changes besides the teacher transfers. . . ."
>
> *St. Louis Globe-Democrat*, December 26, 1975, (quoting Ernest Calloway, an urban affairs expert and professor): "The whole problem has been one of quality, not whether black children have been going to school with white children."
>
> *St. Louis Sentinel*, January 1, 1976: ". . . Black parents have merely wanted equality in teaching . . ."
>
> *Christian Science Monitor*, January 16, 1976, (quoting Meyer Weinberg, nationally recognized expert on integration and lecturer at Northwestern University): "As long as a school system says 'we're not going to bus,' then they're not really going to desegregate."
>
> *St. Louis Post-Dispatch*, January 18, 1976, (quoting original plaintiff, Liddell): " [I]n a city that is largely black, there might be some all-black schools. But all the children should have top-quality education and the option to go to an alternative school." The paper reports: "She said that she wanted to avoid massive court-ordered busing practice . . . [it would] not necessarily improve the quality of education."

[8] The record reveals that since the consent decree the school district has broadened its magnet school program and has achieved some degree of success in doing so. However, in view of the small percentage of students participating, the magnet school program must be recognized as only an adjunct to a plan of desegregation and it cannot constitute the plan itself.

of 147 public elementary schools in St. Louis the record shows that 121 (82.3%) had enrolled 90% or more pupils of one race. Of these, 87 schools had 90% or more black, and 34 had 90% or more white. Furthermore, 51 elementary schools were 100% black and 15 were 100% white. At the high school level, 12 of the 17 schools (70.5%) were comprised of 90% or more pupils of one race. The enrollment in 11 high schools was 90% or more black and one high school had 90% or more white. Seven high schools were 100% black. Thus, in the entire public school system, a total of 55,713 black pupils were enrolled in schools 90% or more black, and 16,442 white pupils were enrolled in schools 90% or more white. The original complaint filed in 1972, and the proposed findings of fact and conclusions of law submitted by the original plaintiffs, sought an end to the *de jure* dual school system for all students and faculty, and with respect to curriculum. As late as September 1974, the original plaintiffs proposed findings of fact and conclusions of law in accord with the petitioners' claims here.[9]

Petitioners now allege that the plaintiffs have abandoned their original goal. This, they claim, is evidenced by plaintiffs' consent to the entry of the December 1975 decree. One element

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[9] The complaint filed by the original plaintiffs succinctly summarizes the relief sought by their proposed decree of September 1974:

> . . . that this court require the defendants to prepare and submit for approval of this court a plan for the operation of *all the public schools within the defendant Board of Education school system* in conformity with the requirements of the Fourteenth Amendment, including, but not limited to, the non-discriminatory allocation of financial and physical resources; *the establishment of school geographical boundaries and district geographical boundaries which are not racially identifiable; the location, construction and utilization of new buildings and the utilization of existing school buildings* in a manner which are (sic) not racially identifiable; the *assignment of pupil populations,* staffs, faculties, *transportation routes* and activities which are not racially identifiable; and that the plan be effective at the earliest possible date.

(Emphasis added).

of the decree which they specifically attack is its lack of an attempt to integrate any of the elementary or junior high schools. They complain that the decree contains only a general direction to the school board to make a study on the realignment of feeder zones affecting the high schools. The only specifics of the consent decree relating to desegregation of students read:

> ORDERED, ADJUDGED AND DECREED that:
>
> . . . . . .
>
> 9. Before the beginning of the 1977-1978 school year, defendants shall make a study of realignments of all elementary feeder schools to the academic high schools for the purpose of reducing racial isolation and segregation at the said high schools, and shall submit a report thereon to the Court, on or before January 15, 1977, with implementation to begin September, 1977.
>
> 10. The defendants are hereby ordered to make a study and report to the Court on or before May 1, 1976 as to whether or not the following items will assist in eliminating or reducing segregation:
>
> (a) Establishing elementary magnet schools with specialized curriculum, having an open enrollment by application.
>
> (b) Establishing high schools for the study of the visual and performing arts, for the study of mathematics and physical and natural sciences, and other subject areas, such schools having open enrollment by city-wide application.
>
> (c) Recognizing that the above measures are basically experimental in nature, a study of the feasibility of curriculum improvements or other changes that should be instituted in the system as a whole shall be undertaken for the purpose of increasing the quality of education throughout the system, all within the context of reducing racial isolation in the schools and with the goal of de-

> segregating the school system. A report shall be made to the Court by May 1, 1976, with implementation beginning with the school year 1976-1977.

Consent Judgment and Decree, filed Dec. 24, 1975.

On appeal petitioners attack the decree by saying:

> The consent decree is constitutional (sic) inadequate in substance because it provides only for the transfer of personnel to desegregate the faculty of the public school system, and makes no provision for pupil reassignment.
>
> . . .
>
> . . . [T]he decree makes no provision for desegregation of the elementary schools, which are almost totally black in a school system which was previously segregated by state law. The decree includes only a limited opportunity for desegregation of a very few schools through "free choice" enrollment in so-called "magnet" schools. Furthermore, while calling for "studies" of the reassignment of elementary feeder schools, reports of these studies are not due until January 15, 1977, with implementation delayed until September, 1977.

As we stated earlier, we do not believe that the merits of the consent decree are before us, since we consider the decree interlocutory in nature. We do observe, however, that if the overall plan to be submitted by the board contains major deficiencies in the respects asserted, the plan will encounter serious constitutional objection.[10]

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[10] Great stress has been placed by the parties in achieving and improving the quality of education within the St. Louis schools. Although efforts to improve the quality of education for all students is desirable, this emphasis fundamentally misapprehends the constitutional requirement of achieiving a unitary school system. The achievement of quality education is not premised on the equal protection clause of the Fourteenth Amendment. Prior to *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), it had been urged that quality education could be made available to all students without integration. Separate but equal concepts have now long been rejected. Federal courts lack jurisdiction under the Fourteenth Amendment to require quality education in state school districts other than to erase the effects of prior school segregation. The sole goal of *Brown* is to erase the dual educational system and achieve unitary schools. Recognition of equal protection principles under the Fourteenth Amendment is focused on achieving a society that is not divided by skin color; to this end it is important that black and white children accept one another at an early age. *See Brown v. Bd. of Educ., supra*, 347 U.S. at 494; *Kemp v. Beasley*, 389 F.2d 178 (8th Cir. 1968). Segregated school systems have undoubtedly resulted in a loss of *equal opportunity* for quality education for all students. However, it is the "equal opportunity," not the quality education which is germane to the constitutional concern.

In *Davis v. Bd. of School Commissioners of Mobile County*, 402 U.S. 33, 37 (1971), the Supreme Court observed that: "[E]very effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation" must be made by school districts.[11]

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[11] If appellants' objections to the consent decree accurately anticipate the ultimate plan of the school board, we observe that such a plan would fall far short of the desegregation plans now required for the Atlanta, Georgia, and Detroit, Michigan, school districts.

As of September, 1975, the Detroit school district served 247,774 students with a 75/25 black-white ratio. Under the plan approved there 27,524 students were reassigned to integrated schools. The plan changed the racial balance by 105 of the approximately 300 schools in the system. Under the plan no school had less than 30% black students. The Sixth Circuit recently remanded the district court order for reconsideration in an attempt to desegregate further in three black residential areas excluded from the plan, and to integrate the faculties up to a 50/50 ratio. *See Milliken v. Bradley*, 540 F.2d 229 (6th Cir. 1976), *cert. granted*, 45 U.S.L.W. 3363 (Nov. 16, 1976).

In Atlanta, Georgia, in 1975, 85% of students within the district were black, yet the most recent plan approved by the Fifth Circuit requires a 30% mix of black students in previous all-white schools. *Calhoun v. Cook*, 522 F.2d 717 (5th Cir.), *reh. denied*, 525 F.2d 1203 (1975).

The study of these two desegregation plans reveals that under those circumstances complete integration was impossible. Both plans necessarily left several all black schools. Yet such studies disclose that district courts and school boards, facing more difficult problems

In view of the difficult problems in working out a meaningful constitutional plan, we suggest to the district court that it invite the United States Department of Justice to intervene, and that the same invitation be extended to the Missouri State Board of Education. We recommend that the parties explore the creation of a bi-racial citizens advisory committee, which has worked so successfully in other areas of the country. The Supreme Court decision in *Milliken v. Bradley*, 418 U.S. 717 (1974), seemingly deters the merger of two school districts unless racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or unless district lines have been deliberately drawn on the basis of race. *But cf., Newburg Area Council, Inc. v. Bd. of Educ. of Jefferson County, Ky.*, 510 F.2d 1358, 1360 (6th Cir. 1974), *cert. denied*, 421 U.S. 931 (1975). *See also United States v. Bd. of School Comm'rs of Indianapolis, Ind.*, 541 F.2d 1211 (7th Cir. 1976), *petition for cert. filed*, 45 U.S.L.W. 3372 (Nov. 16, 1976); *Evans v. Buchanan*, 416 F. Supp. 328 (D. Del. 1976), *appeal dismissed*, 45 U.S. L.W. 3393 (Nov. 30, 1976). However, investigation into the voluntary cooperation of the county in accepting minority transfers should not be overlooked. *Cf. Milliken v. Bradley*, 540 F.2d 229, 235, n. 3 (6th Cir.), *cert. granted*, 45 U.S. L.W. 3363 (Nov. 16, 1976).

In view of the delayed implementation of any plan, we direct the district court to immediately grant the appellants' petition for intervention. In order to avoid future piecemeal appeals, we additionally direct that the district court hear, as soon as possible, any objections to the school board's January 1977 plan, and that within a reasonable time prior to entering its approval the court require that the parties submit

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than presently confronting the St. Louis system, are using every effort possible to achieve desegregation of prior *de jure* school systems. It should be obvious that anything less than similar efforts in St. Louis would fall short of constitutional requirements.

alternate plans. In no event should implementation of plans for a unitary school system be delayed beyond the commencement of the 1977-78 school term.

Judgment reversed and remanded for further proceedings in the district court.

A true copy. (Seal)

Attest: Robert C. Tucker

Clerk, U. S. Court of Appeals, Eighth Circuit.

RESPONDENTS' APPENDIX D

United States Court of Appeals
for the Eighth Circuit

No. 76-1228

Craton Liddell, a minor, by Minnie Liddell, his mother and next friend, et al.,
Appellees,
and
The Board of Education of the City of St. Louis, State of Missouri, et al.,
Appellees,
v.
Earline Caldwell, a minor, by Lillie Caldwell, her mother and next friend, et al.,
Appellants.

Filed: January 28, 1977

ORDER

This matter comes before the court on defendant's motion for stay of mandate pending petition for certiorari. The motion is denied and the mandate is ordered to be issued forthwith.

In order for the parties and the district court to fully understand the court's denial of the stay, we set forth our reasoning.

The only issue decided by this court, as specifically recited in the court's opinion filed December 13, 1976, related to the

district court's order denying the petition for intervention. The consent decree requiring integration of the St. Louis School District[1] entered by the district court on the 24th of December 1975, was interlocutory in form. In paragraph 9 of the decree the district court expressly ordered that a further report be made to the court, "on or before January 15, 1977, with implementation to begin September 1977."

The intervenors limited their objections to the decree to the proposed overall remedy and made substantial allegations that the original plaintiffs were not adequately representing the class in obtaining constitutional relief from an admittedly segregated school system. This court allowed intervention to assure the plaintiff class adequate representation and to provide the district court witn meaningful input from all parties to achieve a constitutional plan. The merits of the consent decree were not before this court.

This court views the consent decree, although interlocutory as to remedy, still obligatory on the respective parties to go forward with implementation of a desegregation plan; we assume that in doing so all of the parties will proceed in good faith to make "every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." *Davis v. Board of School Comm'rs.*, 402 U.S. 33, 37 (1971).

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[1] Paragraph 4 of the consent decree reads:

> 4. Defendants, their agents, officers, employees and successors, and all those in active concert and participation with them shall be enjoined and prohibited from discriminating on the basis of race or color in the operation of the School District of the City of St. Louis, and shall be required to take affirmative action to secure unto plaintiffs their right to attend racially nonsegregated and nondiscriminatory schools, and defendants will afford unto plaintiffs equal opportunities for an education in a nonsegregated and nondiscriminatory school district, and shall be required to take the affirmative action hereinafter set forth.

Under the decree, the parties have a constitutional obligation to proceed immediately to comply with the district court's order to prepare a plan for its approval and to implement that plan beginning in September 1977. A further stay at this time, particularly in view of the fact that the consent decree is still interlocutory, would simply delay further implementation of that plan and the achievement of equal educational opportunity for the plaintiff class in a non-discriminatory school district.

It is so ordered.

By the Court

A true copy.

Attest:

/s/ ROBERT C. TUCKER
Clerk
U. S. Court of Appeals
Eighth Circuit

(Seal)

RESPONDENTS' APPENDIX E

United States District Court
for the
Eastern District of Missouri

I, William D. Rund, Clerk of the United States District Court for the Eastern District of Missouri, and keeper of the records and seal thereof, hereby certify that the documents attached hereto are true copies of Docket entries for the dates November 30, 1978 thru and including April 20, 1979 in Cause 72 C 100 (1) Liddell, et al. vs. The Board of Education of the City of Ct. Louis, et al., now remaining among the records of the Court.

In testimony whereof I hereunto sign my name and affix the seal of said Court, in said District, at St. Louis, Mo., this 27th day of April, 1979.

William D. Rund
Clerk

I, James H. Meredith, United States District Judge for the Eastern District of Missouri, do hereby certify that William D. Rund, whose name is above written and subscribed, is and was at the date thereof, Clerk of said Court, duly appointed and sworn, and keeper of the records and seal thereof, and that the above certificate by him made, and his attestation of record thereof, is in due form of law.

April 27, 1979.

J. H. Meredith
United States District Judge

I, William D. Rund, Clerk of the United States District Court for the Eastern District of Missouri, and keeper of the seal thereof, hereby certify that the Honorable James H. Meredith whose name is within written and subscribed, was on the 27th day of April, 1979, and now is Judge of said court, duly appointed, confirmed, sworn, and qualified; and that I am well acquainted with his handwriting and official signature and known and hereby certify the same within written to be his.

In testimony whereof I hereunto sign my name, and affix the seal of said Court at the city of St. Louis, in said State, on this 27 day of April, 1979.

William D. Rund
Clerk

Date	Proceedings
Year	
1978	
Nov. 30	Order fld. The mtn of the plff-intervenors and the plff to strike pages 83-88 of defts' reply brief is denied. However, the attachments to the defts' brief are not considered by this Court as being evidence in the case. cc attys
Nov. 30	Oral argument will be had on Friday, Feb. 2, 1979 at 10 AM. (noticed by Ct)
1979	
Jan. 15	Suppl memo of intervening plffs, Adams, et al., fld.
Jan. 15	Suppl brief for plff-intervenor USA, fld.
Jan. 15	Suppl. brief of Missouri State defts, fld.
Jan. 16	Defts St. Louis Board of Education, et al granted until 1/16/79 to file their response to the Court's request for information.

Jan. 16	Response of defts Board of Education, et al, to Court's request for information, fld.
Jan. 24	Notice of adoption of the suppl brief for plff-intervenor U.S. by plffs-intervenors Caldwell, et al, fld.
Jan. 29	Reply suppl brief of Intervening Plffs Adams, et al, fld.
Jan. 29	Reply of defts Board of Education, et al, to supplemental brief of plff-intervenor USA, fld.
Feb. 1	By leave, defts Board of Education, et al, amend by interlineation their brief-in-chief.
Feb. 2	Oral argument commenced & concluded.
Feb. 14	Depo of witness James A. Scott, on behalf of Amici Adams, et al, dtd 5/17/78, fld.
Mar. 13	Transcript of oral argument on 2/2/79, fld by reptr Groh.
Apr. 12	MEMORANDUM WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW (JHM) fld.
	JUDGMENT (JHM) fld. It is ordered that the Board of Education for the City of St. Louis shall within 90 days from the date this becomes a final judgment supplement its plan filed under the consent decree by filing a plan with such changes as the Board deems appropriate under this decision. In formulating such a plan, the Board will consult with and receive the input of all parties to this litigation and such citizen groups as are available and have offered to assist in the implementation of a plan. The Court has specifically found that there has been no intentional segregation of students by the actions or inactions of the Board and that there has been no constitutional violation by the defendants. In light of this finding the Court directs that the formulation of any plan under the consent decree have as its goal quality education which includes

integration of the races where practical and feasible. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the requests of the original plaintiffs and all other intervening plaintiffs who have requested the Court to allow them attorneys' fees and costs be and the same are denied. No attorney's fees are allowed and each party shall bear its own costs. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the request of intervening plaintiffs Adams, et al., to declare unconstitutional the policies of the Department of Housing, Education and Welfare (HEW) concerning the magnet school program is denied for the reasons that the question is moot. Dated this 12th day of April, 1979 (JHM) cc: all attys (2) by mail and hand delivered.

Apr. 13 Page five (5) of Memorandum Opinion mailed to all parties, was missing in original distribution.

Apr. 19 Petition for permission to withdraw as counsel fld. by Forriss E. Elliott and Assoc.

Apr. 20 ORDER (JHM) Granting petition to withdraw.